No. 14,916

IN THE

United States Court of Appeals

For the Ninth Circuit

MILTON H. OLENDER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

(Before Judges Healy, Chambers and Barnes.)

LEO R. FRIEDMAN,
935 Russ Building, San Francisco 4, California,
Attorney for Appellant and Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 14,916

IN THE

United States Court of Appeals

For the Ninth Circuit

MILTON H. OLENDER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

(Before Judges Healy, Chambers and Barnes.)

To the Honorable William Healy, Richard H. Chambers and Stanley N. Barnes, Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant hereby respectfully petitions for a rehearing of the above cause, decided September 24, 1956, on the following grounds, to-wit:

1. The opinion of this court is predicated on the erroneous assumption that appellant carried the burden of proving his innocence; whereas, the burden of proof was at all times on the Government to prove the charges.

2. The opinion erroneously uses the lack of credibility of appellant as supplying deficiencies in the government's case.

3. The opinion, in holding there was a conflict in the evidence, has failed to distinguish between uncontradicted and corroborated evidence introduced by the prosecution and evidence introduced by the defense. The Government was bound by uncontradicted and corroborated evidence which the Government had itself introduced.

4. The opinion has misconstrued and misapplied the holdings in *United States v. Calderon,* 348 U.S. 160.

5. The opinion, probably relying on the misstatements of the record in the appellee's brief, has based each of its conclusions on an erroneous premise.

6. According to the holdings in the *Holland, Smith* and *Calderon* cases the Government failed to establish the net worth of appellant for each of the years involved.

---

1. THE BURDEN OF PROOF NEVER SHIFTS FROM THE PROSECUTION TO THE DEFENSE.

DISBELIEF OF DEFENDANT'S TESTIMONY DOES NOT SUPPLY DEFICIENCIES IN THE PROSECUTION'S CASE.

A reading of the opinion of this Court leads to no other conclusion than that the Court held that because appellant's testimony was not worthy of belief this justified the jury in finding appellant guilty.

Repeatedly throughout the opinion are statements that appellant gave false testimony followed by the conclusion that the government proved the net worths with reasonable certainty.

A defendant in a criminal case is not required to prove his innocence; the burden of proving the charges and each

material element thereof at all times rests upon the prosecution. As said in *Holland v. United States,* 348 U.S. 121:

> "Although it may sound fair to say that the taxpayer can explain the 'bulge' in his net worth, he may be entirely honest and yet unable to recount his financial history. In addition, such a rule would tend to shift the burden of proof. Were the taxpayer compelled to come forward with evidence, he might risk lending support to the Goverment's case by showing loose business methods or losing the jury through his apparent evasiveness. Of course, in other criminal prosecutions juries may disbelieve and convict the innocent. But the courts must minimize this danger."

Disbelief of a defendant's testimony or even the giving of false testimony does not supply deficiencies in the prosecutions proof. If a defendant's testimony is found unworthy of belief this does not establish the fact as being contrary to the testimony as given. If the testimony is true it stands as evidence establishing the fact; if untrue or unworthy of belief this merely leaves the record as if no evidence had been given on the point. (Cf. *Merritt v. Superior Court,* 93 Cal. App. 177, 269 P. 547; *Myers v. Superior Court,* 46 Cal. App. 206, 189 P. 109.)

True, the falsity of defendant's testimony can be used in determining the correctness of evidence introduced by the prosecution; but there must be evidence by the prosecution on the issue before this can be done.

A defendant cannot be found guilty unless the evidence establishes his guilt to a moral certainty and beyond a reasonable doubt. Where the evidence does not reach such

degree of certainty a conviction cannot be upheld on the falsity of the defendant's testimony. (*Olender v. United States,* 210 F. 2d 795.)

---

2. **THE OPINION DISREGARDS UNCONTRADICTED EVIDENCE INTRODUCED BY THE PROSECUTION AND, IN SOME INSTANCES, FINDS DIRECTLY TO THE CONTRARY.**

THE GOVERNMENT WAS BOUND BY EVIDENCE IT HAD INTRODUCED AND WHICH NOT ONLY WAS UNCONTRADICTED BUT WAS AMPLY CORROBORATED BY OTHER EVIDENCE IN THE CASE.

As hereafter demonstrated, the opinion has disregarded uncontradicted evidence introduced by the prosecution, evidence establishing the truth of appellant's contentions. In some instances the opinion finds the fact to be directly contrary to such uncontradicted evidence, evidence which was corroborated by other evidence in the case.

The law is that the prosecution is bound by the evidence it introduces, in the absence of evidence to the contrary. Uncontradicted testimony in a case must be given weight in deciding an issue of fact, providing it is not incredible on its face.

Ariasi v. Orient Ins. Co., (9 Cir.) 50 F. 2d 548, 551;
In re Baumhauer, 179 F. 966, 968;
Jacobson v. Hahn, (2 Cir.) 88 F. 2d 433, 435;
Yellow Cab v. Rodgers, (3 Cir.) 61 F. 2d 729, 731.

The opinion has failed to apply the foregoing rules in evaluating the evidence.

3. INCORRECT STATEMENTS OF FACT IN THE OPINION ON WHICH ARE BASED THE ULTIMATE CONCLUSIONS.

Bearing in mind the foregoing rules, we now point out incorrect statements of fact in the opinion which, if corrected, must lead to a result different from that arrived at by this Court. These matters are stated in the order in which they appear in the opinion and are not arranged in the order of their relative importance.

(a) On p. 1, the opinion states that according to the Government's computations appellant and his wife should have reported net taxable income of $87,999.24 for 1945 and $43,212 for 1946. However, these computations, as contained in U. S. Exhibit 50, are based on the claimed cash on hand of $50,000 at the end of 1944 and $7200 at the end of 1945, amounts which the trial judge held could not be used for any purpose. Thus the computations are left without including any cash on hand, a matter, save as to amount, admitted by the parties.

(b) On p. 3 the opinion emphasizes the training of appellant in accounting and that he made out tax returns for his wife, mother and friends. The record shows that appellant's study of accounting took place some 30 years ago; that the accounting was merely a part of a general science course; that Olender had not taken any further instruction in accounting, etc. (Def's Ex. AD; R. 801, 841) and that he had assistance in preparing the returns. (R. 631.)

(c) On p. 3, the opinion states that Ringo the accountant "discovered records showing appellant's purchase, theretofore undisclosed to the accountant, of a single premium, fully paid, life insurance policy costing $15,-933.46, in 1945."

Ringo, a Government witness, testified in reference to this expenditure "Q. Mr. Olender informed you that he had made that purchase, is that correct? A. That's correct." (R. 188.) On cross-examination Ringo again states that it was Olender who told him of this expenditure for paid up life insurance. (R. 251.)

(d) Again on p. 3, the opinion states that Olender had no record of his living expenses and could give no estimate of the cost of food for 3 people, etc.

The Government introduced as U. S. Exhibits 12 to 16, the books of account of the Army & Navy Store. In Exhibit 12 is a month by month itemization of the withdrawals by Olender for his personal expenses showing expenditures for real and personal property taxes, garage charges and repairs to auto, telephone bills, light bills, cash drawn by Olender used to pay living expenses, lodge dues, etc. (R. 655-662; 675-681.) As to estimating the cost of food, this is a matter that generally is within the peculiar knowledge of the wife of the household.

(e) On p. 4, the opinion states that the "stipulated" deductible personal expenses for cost of living for 1945 was $2,739.38, an amount less than charitable donations for that year.

These figures were agreed to by the Government in the stipulations entered into by the attorneys for the respective parties to avoid the necessity of days of proof by the Government to establish the assets and liabilities of appellant, leaving each party free to introduce evidence as to additional amounts. This cannot be used, in the circumstances, either as an admission against interest on the

part of Olender or as an attempt on his part to falsify such fact to the Government.

(f) On p. 4, the opinion discusses the estimates given by Olender to Ringo (U. S. Ex. 19) showing $50,000 and $7,000 on hand at the end of 1944 and 1945. The opinion then states that these figures were not haphazardly arrived at.

The trial judge ruled out these figures and *they could not be used by the jury and cannot be used by this Court,* though the opinion refers to them several times.

Ringo, the Government witness, testified time and again that these estimates were valueless, that he could not and did not use them in his computations and that he told the I.R. Agents that they were of no value, etc. (R. 165, 260, 268.)

(g) On p. 4, the opinion states that in the original net worth figures "appellant was hard put to explain how he accumulated large sums of cash he thereafter expended." The record is just to the contrary.

Ringo, the Government witness, who prepared the net worth statement (U. S. Ex. 10) included therein as "Cash on Hand and in Banks" the following: "(1) Cash in Vault . . . Dec. 31, 1941, $75,000" and "(1) See affidavit as to creation of this fund." Although the Government introduced this net worth statement, it never produced the affidavit referred to therein.

Ringo testified as follows: Olender had a long story as to this $75,000 and it was covered in the affidavit. (R. 160.) I brought in people to confirm what Olender said

as to his father being wealthy and had the sums available. (R. 162.) On pages 160-162 Ringo gives a long statement of Olender's account as to how he acquired the $75,000. Thus, Olender was not hard put to explain the creation of this fund.

(h) On pp. 4-5, the opinion states: "So that appellant might rebut any inference that his expenditures in 1945 and 1946 were from unreported taxable income, appellant submitted to the Government, through his auditor, an analysis of his net worth January 1, 1942 to December 31, 1947." This statement is in error.

U. S. Exhibit 10 does not purport to be an analysis of Olender's net worth from January 1942 to December 1947; it is an estimate of his net worth on December 31, 1941 and on December 31, 1947. There is nothing therein as to the intervening years.

Olender had no knowledge of what years the Government was going to proceed on against him; he did not then know that he was going to be prosecuted for the years 1945 and 1946.

Ringo further testified that he was first employed by Olender to prepare a year by year net worth statement as requested by the government agents (R. 146); that he never completed such a year by year statement (R. 147); that he never made up a net worth statement for the years 1944, '45 or '46 as he figured it was impossible (R. 233); that the net worth statement he made up was not perfect. (R. 234.)

(i) On p. 7, the opinion lays stress on the failure of Olender to produce at either trial and his inability to

remember what had become of the envelope in which he kept the $20,000 worth of bonds belonging to his mother.

As the existence of this envelope—or some other container—was established by the Government, it is immaterial that Olender did not produce the same.

Ringo, the Government witness, testified that when he went to the safe deposit he made an inventory of the contents of the box. (R. 169; U. S. Ex. 20, the inventory.) On the net worth statement (U. S. Ex. 10) in listing bonds totalling $33,000 Ringo wrote "less held for mother, purchased with her money, $20,000;" Ringo testified that he saw something on the bonds that caused him to identify them as the mother's on the inventory (R. 222); that the inventory contains the numbers and amounts of the bonds being held for her (R. 228); that the bonds had markings attached showing they were the mother's bonds. (R. 230-1.)

In reply to questions by the Court Ringo stated: I believe the bonds were in an envelope, there was something on the bonds identifying them as a group; there was something on the bonds indicating they were the mother's bonds. (R. 302.)

(j) On p. 10, the opinion states: "When the government introduced proof of likely taxable sources from which a jury can reasonably find that the net worth increases sprang, * * *".

There is absolutely no proof in the record of any likely taxable sources—either in 1945 or 1946—from which a jury or anyone else could find that any net worth increases sprang.

If the opinion is referring to the suits that came to Olender from or through Goodman, all these matters occurred in 1944 and do not establish any income for 1945 or 1946.

---

4. THE OPINION HAS MISCONSTRUED AND MISAPPLIED THE HOLDING IN CALDERON v. UNITED STATES.

The opinion herein relies on the case of *Calderon v. United States,* 348 U.S. 160, as authority for the proposition that when an indictment for income tax evasion contains separate counts for different years, the evidence is sufficient if it shows an overall amount of unreported taxable income without allocating any portion thereof to any particular year. We respectfully submit that the *Calderon* case makes no such holding and the language used in the *Calderon* case must be interpreted in the light of the facts therein involved.

First, we call the Court's attention to the language of the Supreme Court in the case of *Holland v. United States,* 348 U.S. 121, 129, as follows:

> "The statute defines the offense here involved by individual years. While the Government may be able to prove with reasonable accuracy an increase in net worth over a period of years, it often has great difficulty in relating that income sufficiently to any specific prosecution year. While a steadily increasing net worth may justify an inference of additional earnings, unless that increase can be reasonably allocated to the approximate tax year the taxpayer may be convicted on counts of which he is innocent."

Clearly, the Court in the subsequent *Calderon* case never intended to abrogate the foregoing Rule.

On pages 6 and 7 of this Court's opinion, it purports to set forth the holding in the *Calderon* case as follows:

> "But one problem remains, the $17,000 hoard of cash could have absorbed the computed income deficiency for one or more of the prosecution years and respondent was convicted on all four counts. It might be argued that there must be evidence of a deficiency for *each* of the years here in issue. There is no merit in this contention. The evidence need not comply with the niceties of the annual accounting concept."

The foregoing *is an incomplete and incorrect quotation from the case.* The full and complete language in the *Calderon* case (348 U.S. at 168) is as follows:

> "The $17,000 hoard of cash could have absorbed the computed income deficiency for one or more of the prosecution years, and respondent was convicted on all four counts. It might be argued that independent evidence showing a $30,000 deficiency is not enough—that there must be evidence that this sum resulted in a deficiency for *each* of the years here in issue. There is no merit in this contention. In the first place, this evidence is merely *corroborating* respondent's cash-on-hand admissions and need not comply with the niceties of the annual accounting concept. While the evidence as a whole must show a deficiency for each of the prosecution years, the corroborative evidence suffices if it shows a substantial deficiency for the over-all prosecution period. Independent evidence that respondent understated his income by $30,000 in the same four-year period for

which respondent's extrajudicial admissions tended to show a $46,000 deficiency is adequate corroboration."

Thus, the correct rule as announced in the *Calderon* case is that the evidence must show a deficiency for each of the prosecution years, corroborated by proof of a substantial over-all amount of unreported taxable income.

In footnote 3 of the *Calderon* case is set forth the computations which show that based on the Government's contention of only $500 cash on hand at the outset, the evidence shows a four-year net worth increase of $46,218 in excess of declared income. If the defendant's testimony was accepted of $17,000 cash on hand at the outset there was still a deficiency of $37,470.00.

In the instant case we have no such situation. The figures of $50,000 and $7200 could play no part in the Government's computations nor in the deliberations of the jury. Either the evidence established over $70,000 in cash at the opening net worth period or the amount of cash on hand remained in the realm of surmise and conjecture with an admission by the Government of a large amount of such cash though undetermined.

This Court relies on the *Calderon* case as establishing that the proof of unrecorded amounts of income lent corroboration to certain extrajudicial admissions of the defendant and support the Government's contention. The facts in the *Calderon* case established a loss of books and records showing income and that this absence of books based upon the other books produced was sufficient to justify the inference of unreported income during such interim of time. Here, we have no such situation. There

is no evidence in the case showing the receipt by Olender in either 1945 or 1946 of any unreported income or of any source from which such income could be produced.

Lastly, this Court relies on the *Calderon* case as holding that the computed income deficiency for one or more of the prosecution years could have absorbed the cash on hand at the outset. In the *Calderon* case appellant's claimed hoard of $17,000 was absorbed by the establishment of proof of equipment which accounted for nearly all of the claimed cash on hand, there being other proof of excessively large expenditures over and above this amount. Here, we have no such situation. On page 15 of appellee's brief the Government admits, assuming Olender had $75,000 in 1943, that at the end of 1944 he would have had $61,000 in cash and this irrespective of any gifts from Olender's mother. The cash expenditures in 1945 could have only come out of Olender's safe deposit box, and were far less than the $70,000 odd dollars claimed by appellant and the same is true in computing the figures for 1946.

Furthermore, in the *Calderon* case there was in the record defendant's extrajudicial statement that he only had $500 in cash at the outset; at a prior trial he testified that he had $2,000 to $9,000 while at the last trial he raised this amount to $17,000.

Here, there is no extrajudicial statement of $50,000 in the record. The trial Court struck out this figure and held it could not be used for any purpose Defendant's testimony at his first and second trial as to the cash on hand at the outset was the same.

The *Calderon* case was dealing only with the corroboration of extrajudicial admissions of the defendant. Here, there were no extrajudicial admissions as to cash, therefore, there could be no corroboration of such a statement.

---

5. INSUFFICIENCY OF THE EVIDENCE.

Bearing in mind the foregoing matters and things, it should be manifest that the opinion of this Court is contrary to the holding in the *Holland* and *Calderon* cases.

There was no evidence establishing the opening net worth of defendant. That he had a large amount of cash on hand stands admitted; either his testimony must be accepted or this amount remains undetermined. The opening net worth not being established, the net worth at the end of 1945 also remained unestablished.

As to the bonds, there is no evidence in the case establishing or from which it could be legally and logically inferred that the bonds belong to the Olenders. The only testimony that could possibly be construed against the mother's ownership of the bonds is that they were purchased by the defendant, were in a safe deposit box and for one year he reported the income thereon. All other evidence in the case is substantial and without conflict that the bonds were purchased for the mother and with her money. This was reported to the Government in 1946; the bonds were sold and the amount deposited in the mother's estate. The letters of the mother are clear that he was to buy the bonds with her money, for her, and to keep them for her.

Even the Government in preparing its case practically admitted that these were the mother's bonds. When Agent Whiteside was on the stand he was asked what effect it would have on the Government's computations if this $20,000 of bonds actually belonged to the mother. (Record 461.) Whiteside testified that prior to the second trial he made such a computation. (Record 458, 481.) The Government established that in 1948 Ringo saw these bonds in the safe deposit box in a separate package or container on which there was a separate identification that the bonds belonged to Olender's mother. The Government also proved that in the Federal Estate Tax Return (U. S. Exhibit 52) for the past few years interest on bonds equalling $20,000 had been included as income in Mrs. Olender's income tax returns.

As to the $20,550 worth of Goodman sailor suits, the Government established the purchase of these suits in early 1944. No evidence as to the disposal of these suits was introduced other than defendant's explanation fully corroborated by the testimony of Lerman and Levy. Either Olender had these suits at the end of 1944 or, if we assume they were sold, he had the proceeds of such sales. In either event his opening net worth must be increased by at least this sum of $25,550.

As to the $7,724 item, this likewise was traced through the testimony of Olender, Levy and the account books of Saraga. As this amount arose out of a transaction in 1944, it could not be used as an asset at the end of 1945 unless it was added as an asset at the end of 1944.

For the foregoing reasons it is respectfully submitted that a rehearing herein be granted in order that the

opinion may be corrected to conform with the record and that when the same is done the judgments be reversed.

In the event of a denial of this petition, appellant intends to apply to the Supreme Court of the United States for a writ of certiorari and, therefore, prays for a stay of mandate of this Court for thirty days in order to enable appellant to make such application.

Dated, San Francisco, California,
October 23, 1956.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Appellant
and Petitioner.

Certificate of Counsel

I hereby certify that I am counsel for Appellant and Petitioner in the above cause and that in my judgment the foregoing Petition for a Rehearing is well founded in point of law as well as in fact and that said Petition for Rehearing is not interposed for delay.

Dated, San Francisco, California,
October 23, 1956.

Leo R. Friedman,
Counsel for Appellant
and Petitioner.